No. 90-303 (2)

Supreme Court, U.S.
FILED
SEP 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

LE BUP THI DAO, et al.,
Petitioners,

VS.

BOARD OF MEDICAL QUALITY ASSURANCE
OF THE STATE OF CALIFORNIA, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF FOR THE BOARD OF MEDICAL QUALITY ASSURANCE, et al. IN OPPOSITION

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

PAUL V. BISHOP
Deputy Attorney General
(Counsel of Record)

VIVIEN HARA HERSH
SUSAN K. MEADOWS
Deputy Attorneys General

DEPARTMENT OF JUSTICE
STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY
GENERAL
1515 "K" Street, Suite 511
Sacramento, CA 94244-2550
Telephone: (916) 324-5337

Counsel for Respondents

September 14, 1990

BOWNE OF SAN FRANCISCO, INC. • 150 NINTH ST. • S.F., CA 94103 • (415) 864-2300

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BRIEF FOR THE BOARD OF MEDICAL QUALITY ASSURANCE, et al. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeal (Pet. App. I, 1-14) is not reported. The opinion appended to petitioners' brief at Petitioners' Appendix II is not properly before this Court since it was withdrawn and superseded by the opinion set forth in Petitioners' Appendix I.[1] Since the Court of Appeal has issued a peremptory writ of mandate to the Superior Court of the State of California,

[1] The Court of Appeal Opinion dated January 5, 1990, Pet. App. II, was withdrawn by the Court of Appeal when it decided to reconsider the matter. The only opinion of the Court of Appeal in effect in this matter is the opinion filed February 26, 1990, Pet. App. I. Therefore, the January 5, 1990 opinion being withdrawn, all matters therein are

County of San Francisco in its case no. AO46101 and has denied the writ of mandate filed by petitioners in its case no. AO46132, the judgment of the Superior Court, although not directly subject to judicial review by this Court, is arguably properly appended as Petitioners' Appendix III. However, the petitioners have failed to append the entire judgment of the Superior Court, and so the entirety of said judgment appears in this brief as Respondents' Appendix A.

JURISDICTION

The judgment of the Court of Appeal was entered on February 26, 1990. The Supreme Court of the State of California denied petitioners' petition for hearing on May 17, 1990. The petition for a writ of certiorari was filed on August 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257(a).

STATEMENT OF THE CASE

The action under review herein is a petition for writ of mandate to the Court of Appeal of the State of California in its Case No. AO46101. Defendants/respondents[2] herein sought review of a partial summary judgment order against defendants by the Superior Court of San Francisco County in Case No. 876321 entitled *Dao, et al. v. Board of Medical Quality Assurance, et al.* The case also concerns the denial of a petition for writ of mandate to the Court of Appeal of the State of California in its Case No. AO46132. Therein, plaintiffs/petitioners sought review of the Superior Court's partial summary judgment order against plaintiffs. A copy of the full order of the Superior Court appears as Respondents' Appendix A, and a copy of the opinion of the Court of Appeal appears as Respondents' Appendix B. The defendants

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considered vacated and nullified with no force or effect. 9 Witkin, Cal. Procedure (3d ed.), Appeal, section 625, pp. 606-607.

[2] For clarity as to the parties involved, petitioners herein, Le Bup Thi Dao, et al., will be referred to in this brief as "plaintiffs" and respondents herein, Board of Medical Quality Assurance (as of January 1, 1990, known as the Medical Board of California), et al. will be referred to as "defendants."

herein are individuals acting in their official capacities and state agencies.

The First Amended Complaint of Course in this case was filed on or about November 24, 1987.[3] The complaint alleged ten causes of action requesting damages and injunctive and declaratory relief on behalf of all plaintiffs. Included in the causes of action were federal actions for damages for violations of plaintiffs' Federal Constitutional rights under 42 U.S.C. sections 1981, 1983, 1985 and 1986.[4] Defendants timely filed their answer to the complaint December 18, 1987. After answer and discovery, a trial date was set for March 20, 1989, but the matter was set over to June 5, 1989.

On April 4, 1989, defendants filed a timely motion for summary judgment or in the alternative summary adjudication of issues with points and authorities and a statement of undisputed facts under California Code of Civil Procedure section 437c (See Resp. Stat. App.). That motion is the focus of the instant petition. Plaintiffs' opposition papers were filed on April 21, 1989 and April 28, 1989. Defendants filed their reply memorandum on May 5, 1989. Hearing was held before the Honorable Stuart Pollak on May 8, 1989. On May 10, 1989, pursuant to the court's concerns, defendants filed a Supplemental Pleading Indexing Facts to Issues and plaintiffs filed a Statement of Issues for Decision.

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[3] There were no references in the complaint filed by plaintiffs to individual conduct violative of plaintiffs' civil rights. In fact, the conduct complained of was the Medical Board's denial of licensure due to alleged racial *animus*. Licenses cannot be denied by any individual member of the Division of Licensing; therefore, racial *animus* must be shown to be the primary motivation for each member of the group who voted against licensure. It should also be pointed out that in the complaint, plaintiffs admit that pre-1975 graduates of the University of Saigon Medical School were routinely licensed, and only some post-1975 graduates, like themselves, had their licensure delayed. That very acknowledgement demonstrates that those delays of licensure did not have anything to do with racial *animus*.

[4] All statutes referred to herein, with the exception of any which are set forth in full in the text of this brief, appear in Respondents' Statutory Appendix.

On May 11, 1989, a further hearing was held before the Superior Court, and the matter was taken under submission after the court requested that plaintiffs draft a partial order. On May 19, 1989, the order prepared by plaintiffs and the order re: summary adjudication of issues were filed (Resp. App. A).

On May 26, 1989, Defendants filed a petition for writ of mandate in Case No. AO46101 before the Court of Appeal of the State of California, First Appellate District, seeking review of the Superior Court order on various grounds. Said petition was summarily denied on May 31, 1989. On June 2, 1989, defendants filed a petition for review before the Supreme Court of California, and the Supreme Court granted a stay of the trial date of June 5, 1989 pending review of the petition. Requests for judicial notice of recent United States Supreme Court cases were subsequently filed.

On June 2, 1989, plaintiffs filed a petition for writ of mandate in Case No. AO46132 before the Court of Appeal of the State of California, First Appellate District, and on June 2, 1989, said petition was summarily denied.

On June 13, 1989 plaintiffs filed an answer to defendants' petition for review to the Supreme Court and included therein a request for review of the Court of Appeal's summary denial of their action also. On July 13, 1989, the Supreme Court of California granted both petitions for review and remanded each case to the Court of Appeal ordering issuance of alternative writs in each case. Alternative writs were issued by the Court of Appeal and served by August 4, 1989.

Oral arguments were held before the Court of Appeal on December 11, 1989, and on or about January 5, 1990, the court issued a proposed decision. On February 5, 1990, the Court of Appeal granted rehearing on its own motion, denying petitions for rehearing filed by both parties as moot.

On February 26, 1990, the Court of Appeal issued its opinion granting defendants' petition for writ of mandate and denying plaintiffs' petition for writ of mandate. This opinion appears in Petitioners' Appendix I and also appears herein as Respondents'

Appendix B. It is this opinion that is the subject of the instant matter.

Plaintiffs did not challenge the findings of fact in the Court of Appeal decision, but on or about April 6, 1990, plaintiffs filed a petition for review before the California Supreme Court. On or about April 30, 1990, defendants filed an answer to that petition for review. On May 17, 1990, the Supreme Court of the State of California issued its order denying plaintiffs' petition for review.

On July 12, 1990, the Court of Appeal issued its peremptory writ of mandate in Case No. AO46101 ordering the Superior Court to vacate its previous order and enter a new order in conformity with the opinion. The instant petition for writ of certiorari was filed before this Court by plaintiffs on August 15, 1990.

STATEMENT OF FACTS

Plaintiffs'/Petitioners' explication of the factual background for this action is so completely skewed and unsupported by any evidence in the record that defendants feel compelled to set forth their own statement, which is based upon the record before both the trial court and the Court of Appeal.

On or about April 30, 1975 the government in South Vietnam was overthrown by the communist government of North Vietnam. Prior to the capital, Saigon, being captured by the North Vietnamese there was a school there known as the University of Saigon Medical School. That school had a curriculum that was accepted by some licensing agencies in the various states to be equivalent to the curriculum used by medical schools in the United States. Accordingly, people who demonstrated by official documentation that they were graduates of that school and that they had completed the course of study required by law were eligible to take the required tests and to become licensed to practice medicine in those states.

However, after South Vietnam was overthrown by the communists, it became difficult to obtain official documentation or other reliable records from that country. Therefore, the American

Medical Association developed and sponsored a Faculty Counsel In Exile (FCIE) which consisted of University of Saigon Medical School faculty who had fled South Vietnam just prior to its collapse. The purpose of this FCIE was to review all the available evidence presented by refugees from Vietnam to determine whether they had properly completed the required courses of study at the University of Saigon Medical School prior to 1975. If the FCIE found the applicant had completed the required course of study, it would so certify and that certification was accepted by some of the states' licensing agencies as official documentation to establish that such person was a graduate of the University of Saigon Medical School.

The Board of Medical Quality Assurance (now Medical Board of California), Division of Licensing, is the licensing agency responsible for determining an applicant's eligibility for licensure as a physician and surgeon in California (Cal. Bus. & Prof. Code § 2005; See Resp. Stat. App.). In order to be eligible to be licensed to practice medicine in California, an applicant must, by law, provide official documents or other satisfactory evidence to the Division of Licensing that he or she has either been graduated from an approved medical school in the United States or Canada or a foreign medical school that provided an equivalent medical education (Bus. & Prof. Code §§ 2089 & 2089.5; See Resp. Stat. App.). The applicant must also provide satisfactory evidence that he or she has completed the statutorily required courses of study in medicine and pass a written examination known as the Federal Licensing Examination (FLEX). After passing that examination an applicant must complete a period of post-graduate training. To be eligible for such training in California, an applicant must have a current letter from the Division of Licensing authorizing him or her to participate in a residency program in California. Once the postgraduate training is completed, an applicant who is otherwise qualified must also take and pass an oral examination (Bus. & Prof. Code § 2080 ff; See Resp. Stat. App.).

Commencing in 1976, the Division of Licensing accepted certifications from the FCIE as official documentation that an applicant had been graduated from the University of Saigon Medical School. By 1984, approximately 400 applicants were

licensed to practice medicine in California based upon the FCIE certifications. However, in late 1983 the staff of the Board of Medical Quality Assurance and the Division of Licensing conducted a review of the state's licensing policy and questions were raised concerning the validity of FCIE certifications. Furthermore, certifications not authorized previously by the FCIE were being received. Therefore, in 1984, an investigation of FCIE was begun. The initial investigation revealed that FCIE members did not have sufficient evidence to support many of the certifications it was providing for applicants.

During 1984 and 1985, the Division of Licensing was overwhelmed by allegations of fraud perpetrated by various foreign medical schools and alleged graduates of medical schools. Therefore, because there were then no present applicants claiming to be graduates of the University of Saigon Medical School who were near eligibility for licensing, the investigation into the FCIE was not pursued vigorously until the Board of Medical Quality Assurance resources could be redirected.

Legislation specifying minimum educational requirements and limiting the discretion of the Division of Licensing became effective on January 1, 1986 (Bus. & Prof. Code §§ 2084, 2085, 2089 & 2089.5; See Resp. Stat. App.). At a regularly scheduled meeting on January 30, 1986, staff advised the members of those changes. The members of the Division of Licensing were also formally advised of the staff's concerns about various United States and foreign medical education programs. They were also advised about staff concerns with the credentials presented by applicants from Vietnamese schools and of the investigation of FCIE which had begun in 1984. At that time, decisions were made to disapprove several medical programs that did not comply with the new law and to suspend any further processing of applications from graduates of some medical programs under investigation. That suspension included applications from persons who claimed to be graduates of medical schools in Vietnam until the FCIE investigation was completed.

In 1982, plaintiffs Dao, Le, and Nguyen passed the FLEX examination and in 1984, plaintiff Tran passed it. However, none of them had submitted the required documentation of their

medical education and training. After completing the necessary postgraduate training, plaintiffs Dao and Nguyen took and passed the required oral examination in January 1986. Before the previously mentioned January 1986 decision to suspend further processing was communicated to the clerical staff of the Division of Licensing, letters were mailed to plaintiffs Dao and Nguyen advising them that they were eligible to be licensed. However, they were subsequently advised in June 1986 that they would not be licensed until they provided adequate evidence that they had completed the undergraduate medical education required for licensure in California.

In May 1986, after reviewing applications of several individuals allegedly graduated from Vietnam medical schools, the Division of Licensing formally decided to suspend the processing of applications from Vietnam medical schools pending completion of the FCIE investigation. Thereafter, all applicants from Vietnamese medical schools were advised by letter as to their status. All of the applicants were advised they must await completion of the FCIE investigation if they were relying on it to certify their records. Those claiming to have graduated after 1975 were advised that they were required to substantiate their post-1975 education with official documents or other acceptable evidence to prove they met the minimum statutory requirements for licensure in California.

In June 1986, the FCIE investigation was completed. The conclusion, based on that investigation, was that for persons graduated from the University of Saigon Medical School prior to 1975, the FCIE was properly carrying out its duty to investigate and certify only those persons who had attended and completed the required studies in those schools prior to 1975. However, all of the members of the FCIE had left Vietnam prior to the takeover in 1975 and were not authorized to attest to anything that happened thereafter.

Applicants alleging that they were graduates from medical schools in Vietnam after 1975 were advised that to be eligible for licensure in California they would be required to supply the Division of Licensing with adequate official or verifiable documentation that would establish their claims. At that time, July 1986, only 32 of the pending 147 applicants from Vietnam

medical schools were persons who claimed to have been graduated after 1975. However, the staff of the Division of Licensing tried to assist them to obtain the necessary information by compiling evidence about the medical school after the government collapsed in Saigon.

A proposal was made to the Division of Licensing to establish a second FCIE composed of ex-faculty members who had taught at the University of Saigon Medical School between 1975 and 1980. Pursuant to that proposal, the second FCIE would certify both as to the adequacy of the medical education at that school and, based on documents, records, and personal knowledge, the completion of that education by the various applicants.

During August, September, and October of 1986, information concerning the medical school and faculty members was obtained by the staff of the Division of Licensing. Stephen Wilford, the staff member responsible for analyzing that proposal, became ill and died without completing that analysis. However, Marc Grimm, the Program Manager, reviewed that proposal and recommended that it be rejected.

In November 1986, plaintiffs Dao and Nguyen requested both a formal administrative hearing on their applications and reconsideration by the Division of Licensing's Credentials Committee. They were advised by staff that they had to make a choice of one or the other. After conferring with counsel, they withdrew their requests for a formal administrative hearing and sought reconsideration by the Credentials Committee.

In December 1986, the Credentials Committee reviewed the new applications of plaintiffs Dao and Nguyen and concluded that they had again failed to provide satisfactory evidence to establish the necessary undergraduate medical education to qualify for licensure. As it had done previously in August 1986, the Division of Licensing notified the applicants of their decision. In the notice to plaintiff Dao, the Division further suggested a way in which she might satisfy the requirements and complete her medical education. That suggestion was rejected by plaintiff Dao, who then requested a formal administrative hearing as well as further

reconsideration by the Credentials Committee. In June 1987, her application was again rejected.

In January 1987, plaintiff Tran applied for an updated letter for residency so he could become eligible for ranking for a residency program in California. That application was rejected in April 1987 because before an applicant can obtain such a letter, he must provide adequate evidence that he had completed the undergraduate medical education necessary for licensure in California.

In April 1987, plaintiff Le's application to take the required oral examination was rejected because he failed to provide adequate evidence that he had completed the undergraduate medical education necessary for licensure in California.

In May of 1987, staff members from the Division of Licensing together with a representative from the Attorney General's Office interviewed several ex-faculty members from the University of Saigon Medical School who had for a while remained in Saigon after the government there had collapsed. Some of those ex-faculty members had prepared declarations and certifications concerning the curriculum of the medical school and the completion of that curriculum by various applicants. However, when interviewed, they told conflicting stories and admitted certifying as to the accuracy of some applicants' alleged medical education even though they had no personal knowledge thereof.

When the Division of Licensing received the report of the staff concerning those interviews with the ex-faculty members, it reaffirmed its decision to refuse to accept credit for the medical education allegedly received at the University of Saigon Medical School after 1975 unless the applicant could establish evidence, satisfactory to the Division of Licensing, that they had in fact obtained such training and had satisfied the requirements of California law.

In September of 1987, legislation was enacted which required the Division of Licensing to appoint a Faculty-in-Exile Committee (similar to the FCIE) to establish what the curriculum was at the University of Saigon Medical School after 1975, and to review the files of applicants who claimed to have been admitted to the University of Saigon Medical School before 1975 and graduated

during the years 1975 to 1980. After that review, the committee was empowered to make recommendations concerning licensing to the Division of Licensing. That legislation, codified as Business and Professions Code section 2122, now requires the Division of Licensing to accept the recommendation of that committee and license those individuals unless it finds that the committee's recommendation is not based upon substantial evidence (Bus. & Prof. Code § 2122; See Resp. Stat. App.). Accordingly, the Division has accepted those recommendations and licensed those applicants, including the individual plaintiffs in this case.

ARGUMENT

I

SINCE THE STATE COURT OF APPEAL, IN ITS UNPUBLISHED OPINION,[5] PROPERLY INTERPRETED AND APPLIED THIS COURT'S HOLDING IN *JETT v. DALLAS INDEP. SCH. DIST.*, 109 S.Ct. 2702 (U.S., June 22, 1989), CERTIORARI SHOULD NOT BE GRANTED ON THAT ISSUE

The issue in *Jett v. Dallas Independent School District,* 109 S.Ct. 2702 (U.S., June 22, 1989) was whether a municipality may be held vicariously liable for its employee's violations of 42 U.S.C. section 1981 on the theory of *respondeat superior.* In order to reach the analysis of this problem, this Court examined the interrelation between section 1981, which was initially part of the Civil Rights Act of 1866 and 42 U.S.C. section 1983 of the Civil Rights Act of 1871, which provided for actions at law against state actors for constitutional violations where the violations were committed under color of state law.

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[5] We should be reminded that as an opinion not certified for publication by the Court of Appeal, the opinion itself has no precedential value. California Rules of Court, Rule 977 states, in pertinent part: "(a) An opinion that is not ordered published shall not be cited or relied upon by a court or a party in any other action or proceeding . . . ." See also, *Ramon v. Moran,* 201 Cal.App.3d 431, 437, fn. 4; 247 Cal. Rptr. 117, 119, fn. 4 (Ct. App. CA, 1988).

Jett's holding with respect to governmental entities was that since section 1983 provides the exclusive remedy at law against state actors for violations of section 1981, *respondeat superior* liability is not available under section 1981 because it is not available under section 1983. *Id.* at 2723-2724. This Court necessarily analyzed the statutory history of both sections and their interrelation to reach its conclusion. In the course of its analysis, the Court announced its holding as to section 1983 being the exclusive damage remedy against state actors for section 1981 violations, since 1983 specifically provides for an action at law and because it encompasses the rights set forth in 1981. *Id.* at 2722.

A. *Jett* Does Not Create a Cause of Action at Law for Violations of Section 1981

Plaintiffs have sought to confuse this issue by giving their own "spin" to the opinion in *Jett*. Plaintiffs have inappropriately attempted to characterize that case as implying a right of action in damages for plaintiffs under 42 U.S.C. section 1981 against state actors such as the individual defendants herein, by quoting Justice O'Connor's opinion out of context.

In the context of the quotation from *Jett* on page 15 of petitioner's brief, concerning the application of section 1981 to private actors, this Court was referring only to actions for racial discrimination against private individuals who were, in fact, *not* acting "under color of state law" within the terms of section 1983. *Id.*, at 2720. Because section 1983 does not provide a damages remedy under those circumstances, a remedy was implied under section 1981. The Court goes on to say, at p. 2720:

> "That is manifestly not the case here [in an action against a governmental entity] and whatever the limits of judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express declaration by Congress concerning the scope of remedies available under a particular statute. [Citations Omitted]"

Plaintiffs' action against defendants is most assuredly an action against state actors. The individually named defendants herein

were acting as members of the Board of Medical Quality Assurance at the time that plaintiffs' licensure were delayed. Under the facts of this case, there is no way that they can be characterized as individuals acting in their private capacities who did not act under color of state law.[6]

B. Cases Prior to *Jett* and After *Atascadero* Made it Clear that No Damages Remedy Exists Under Section 1981

Petitioners contend that the Court of Appeal committed error by expanding the holding in *Jett v. Dallas Independent School District, supra,* at 2722 to preclude a cause of action for damages against a state or its agencies under 42 U.S.C. section 1981. That contention is *a fortiori* without merit because after this Court's announcement of a stringent rule of construction as to Congressional intent to abrogate sovereign immunity in *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985), courts have uniformly found that section 1981 does not create a cause of action against states or state entities. In *Dellmuth v. Muth,* 109 S.Ct. 2397, 2401 (U.S., June 15, 1989) this Court definitively reaffirmed the federal rule of construction announced in *Atascadero*:

> "Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is 'unmistakeably clear in the language of the statute,' *Atascadero, supra* at 242. Lest *Atascadero* be thought to contain any ambiguity, we reaffirm today that in this area of the law, *evidence of congressional intent must be both unequivocal and textual.*" (emphasis added)

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[6] Appearing as Respondents' Appendix C is a true and correct copy of plaintiffs' reply to defendants' Statement of Undisputed Facts, Fact No. 24, wherein plaintiffs admit not only that the individual respondents are state officials acting under color of state law, but also that they were at all times material to this matter, acting in their official capacities. This document was part of the record before the Court of Appeal and before the trial court.

In the case of *Freeman v. Michigan Dept. of State,* 808 F.2d 1174 (6th Cir. 1987), the Sixth Circuit Court of Appeals applied that rule of construction in interpreting section 1981. After a careful analysis of the law, the court specifically held that section 1981 did *not* create a cause of action against state entities. A federal district court in *Malone v. Schenk,* 638 F.Supp. 423, 429 (C.D. Ill. 1985), had previously applied the rule and reached the same conclusion. Also see *BV Engineering v. U.C.L.A.,* 858 F.2d. 1394 (9th Cir. 1988) and *Mitchell v. L.A. Comm. College Dist.,* 861 F.2d. 198 (9th Cir. 1988).

Plaintiffs apparently contend in their petition that this Court, by its statements in *Jett* concerning the fashioning of a remedy under section 1981 against private actors, somehow reversed the holdings in *Atascadero* and *Dellmuth*. This is patently absurd. *Jett* itself did not deal with sovereign immunity; it only concerned whether an action at law was available under section 1981. The law with respect to section 1981 and sovereign immunity has been settled since *Atascadero* because it is obvious that Congress expressed no unequivocal intention to abrogate sovereign immunity in section 1981, or in section 1983. (See *Will v. Mich. Dept. of State Police,* 109 S.Ct. 2304, 2312 (U.S., June 15, 1989)).

C. Plaintiffs are Not Entitled to a *Bivens* Type Action

Plaintiffs also apparently imply by their quotation at page 15 of their brief that since sovereign immunity bars an action against a state or state officials acting in their official capacities by reason of *Will v. Michigan Department of State Police,* 109 S.Ct. 2304 (U.S., June 15, 1989) (See discussion, *infra*) and because *Jett* precludes a remedy under section 1981, this Court should imply a remedy under the Fourteenth Amendment itself. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U.S. 388 (1971). We must first be mindful that *Bivens* implied a right of action against Federal actors, and so sovereign immunity was not even an issue.

If indeed, this is what plaintiffs imply, they are mixing two mutually exclusive concepts. The whole purpose of sovereign immunity would be defeated if such an action were implied. Plaintiffs are asking this Court to find a way to circumvent the

sovereign immunity of the various states by implying a civil damages action against the state and state officials acting in their official capacities under the Fourteenth Amendment.

Defendants point out that in *Jett,* this Court flatly rejected a similar invitation to judicially upset the federal balance of power. In response to the petitioner's request for a *Bivens*-type action implied directly from the Fourteenth Amendment, this Court responded:

> "We can find no good logic nor sound legal basis for this view; accord [citations omitted]. Given our repeated recognition that the Fourteenth Amendment was intended in large part to embody and expand the protections of the 1866 Act as against state actors, we believe that the logic of these decisions applies with equal force to petitioner's invitation to this Court to create a damages remedy broader than section 1983 from the declaration of rights now found in section 1981." *Jett v. Dallas Indep. Sch. Dist., supra,* at 2722.

D. The Holding in *Jett* is Not Limited to Municipalities

Finally, plaintiffs' attempt to characterize the Jett case as limited solely to actions brought under section 1981 against local government entities is without merit. The case itself concerns the creation of sections 1981 and 1983 and the interaction of the two statutes; the analysis concerns whether Congress intended to create a right to a damages action under section 1981 *as to state actors,* not just against local government entities. The holding is not limited to local government entities, but states very clearly:

> "*We hold* that the express 'action at law' provided by section 1983 for the 'deprivation of any rights, privileges, or immunities secured by the Constitution and laws,' provides the *exclusive* federal damages remedy for the violation of the rights guaranteed by section 1981 when the claim is pressed against a state actor." (emphasis added). *Jett v. Dallas Indep. School Dist., supra,* at 2722.

The phrase "pressed against a state actor" is obviously meant to distinguish the situation in which the acts proscribed under

section 1981 were undertaken by a private individual not acting under color of state law.

Therefore, certiorari should not be granted based upon the Court of Appeal's claimed erroneous interpretation of the holding in *Jett v. Dallas Independent School District, supra,* at 2722 with respect to a damages remedy under section 1981 because the court below in fact correctly stated and applied the holding in that case.

E. Plaintiffs are Also Not Entitled to Relief Because Their Action Under Section 1981 is Not Based Upon the Making and Enforcement of Contracts

In *Patterson v. McLean Credit Union,* 109 S.Ct. 2363, 2372 (U.S. June 15, 1989) this Court held: "The most obvious feature of the provisions [of 42 U.S.C. section 1981] is the restriction of its scope to forbidding discrimination in the 'mak[ing] and enforce[ment]' of contracts alone. Where an alleged act of discrimination does not involve the impairment of one of these specific rights, section 1981 provides no relief." *Patterson* has been extensively followed by other courts. *Courtney v. Canyon Television Appliance Rental,* 899 F.2d 845, 849 (9th Cir. 1990); *Overby v. Chevron USA, Inc.,* 884 F.2d. 470, 472 (9th Cir. 1989); *Williams v. National R.R. Passenger Corp.,* 716 F.Supp. 49, 50-52 (D.D.C. 1989). In fact, as the case itself indicates, this reading of section 1981 predated *Patterson. Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 436 (1968); *Georgia v. Rachel,* 384 U.S. 780, 791 (1966).

In light of this Court's determination in *Patterson,* it is clear under the facts of this case that plaintiffs would have no cause of action under 42 U.S.C. section 1981, *whether or not* a damages remedy could be implied under that section. The application to a medical board for a license to practice medicine involves no contractual obligation on the part of any party. There is simply no contractual basis for the damages action that plaintiffs brought against defendants under section 1981.

The *Patterson* holding was briefed before the Court of Appeal, but that court did not reach *Patterson* because of this Court's holding as to a damages remedy under section 1981 in *Jett v.*

Dallas Independent School District, supra, at 2722. Thus, even assuming, *arguendo*, that the Court of Appeal was in error in its unpublished opinion concerning *Jett*, plaintiffs would still have no remedy under section 1981.

II

THE COURT OF APPEAL CORRECTLY APPLIED THE HOLDING IN *WILL v. MICHIGAN DEPT. OF STATE POLICE*, 109 S.Ct. 2304 (U.S. June 15, 1989) TO THE FACTS OF THIS CASE

Plaintiffs' arguments that certiorari should be granted to clarify the applicability of the qualified immunity doctrine to defendants sued in their individual capacities are without merit because under the facts of this case, the issue of qualified immunity is not properly before this Court. Furthermore, it is unnecessary to grant certiorari to review the doctrine of qualified immunity in this case because that issue was *never* reached by the Court of Appeal below.

A. The Court of Appeal Did Not Reach the Issue of Qualified Immunity Because It Found No Liability

As previously set forth above, the undisputed evidence before the court below was that the individually named defendants were at all times material to this matter acting solely in their *official* capacities. If plaintiffs disagreed with defendants' Statement of Undisputed Facts, Fact No. 24 (See Resp. App. C), then it was incumbent upon them to dispute this fact at the trial court level under California Code of Civil Procedure section 437c (b) (See Resp. Stat. App.), which governs the procedures for summary judgment motions.[7] Instead, plaintiffs agreed with defendants'

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[7] "The purpose served by the summary judgment procedure is to expedite litigation by avoiding needless trials . . . It permits the court to *pierce the allegations of the pleadings to ascertain whether a genuine cause of action in fact exists* or whether the complaint is sham or feigned." (emphasis added). *Property Controllers, Inc. v. Shewfelt*, 245 Cal.App.2d 755, 761; 54 Cal. Rptr. 218, 221 (Ct. App. CA, 1966); *Reich v. Yow*, 249 Cal.App.2d 12, 14; 57 Cal. Rptr. 117, 119 (Ct. App.

statement that all of the alleged conduct complained of was official conduct and never provided the superior court or the Court of Appeal with any evidence to indicate otherwise. Therefore, the Court of Appeal found that there was "considerable, uncontradicted evidence that an undisputed material fact was that the 'individual defendants . . . were at all times material to this matter state officials acting in their official capacities under color of State Law.'" (Resp. App. B, at 8).

Plaintiffs contend that the use of a simple pleading device alleging that individual defendants are sued in their individual as well as their official capacities defeats a finding on summary judgment that the individual defendants were at all times acting in their official capacities. They contend that in spite of a finding that no federal tort occurred, these officials are still "persons" for purposes of suit under section 1983 simply because they were also sued in their individual capacities.

It has been held that acts which violate another's constitutional rights cannot be found to be official acts. On the other hand, official conduct that does not violate federal law is official action. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Scheuer v. Rhodes*, 416 U.S. 232, 237-248 (1973); *Little v. City of Seattle*, 863 F.2d 681 (9th Cir. 1988); *Foulks v. Ohio Department of Rehabilitation and Correction*, 713 F.2d 1229, 1232-1233 (6th Cir. 1983); *Kolb v. State of Ohio Department of Mental Retardation and Developmental Disabilities*, 721 F.Supp. 885, 897 (N.D. Ohio 1989). The findings of the Court of Appeal, after reviewing the evidence in this summary judgment motion *de novo*, were that the individual defendants herein were acting *solely* in their official capacities (Resp. App. B, at 8-9). Therefore, after an analysis of the evidence before it, the Court of Appeal determined that there was no evidence that the individual defendants herein had acted with racial animus when the delays in licensure occurred. The court below was not stating that the defendants were not sued in their individual capacities but rather it was stating that in a motion for summary judgment (as opposed to a motion for judgment on the

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CA, 1967); *Jack v. Wood*, 258 Cal.App.2d 639; 65 Cal. Rptr. 856, 860 (Ct. App. CA, 1968).

pleadings), where evidence is in fact presented, there was no evidence that a constitutional tort was committed.

A summary judgment motion is a review of the evidence to see whether a triable issue of fact exists. The Court of Appeal found no triable issue of fact existed concerning any federal tort and concluded that defendants' conduct was official action. In *Will v. Michigan Department of State Police, supra,* at 2312, this Court held that a state official acting in his or her official capacity is not a person for purposes of suit under section 1983. Plaintiffs' contention that a pleading tactic can defeat a summary judgment motion, where extensive evidence was reviewed, is in direct conflict with the purpose for which summary judgment motions were created: to determine whether a triable issue of fact exists. If a state official sued in both his individual and official capacities is found to have committed no unofficial act (*i.e.,* no constitutional tort) on summary judgment, he is entitled to the designation that he is a state official acting in his official capacity and therefore not a person for purposes of suit under section 1983, as set forth in *Will.*[8]

Plaintiffs' citation to the *Kolb* case, *supra,* is not supportive of their contention. The *Kolb* case was based on a summary judgment motion. After a review of the evidence, the trial court found that one defendant had arguably fired the petitioner therein based upon racial considerations and so ordered that this was a triable issue. As to two other individual defendants, the court found no evidence of a federal tort and granted summary judgment. *Id.* at 905-906. In its judgment, the *Kolb* court made no analysis whatsoever as to whether the individual defendants were entitled to qualified immunity or any kind of immunity. The *Kolb* court's

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[8] Basically, the trial court, in its decision, agreed with the Court of Appeal in finding that there was no evidence that any of the defendants based any of their actions on impermissible racial or ethnic factors (Resp. App. A at 10). Instead of finding that the individual defendants were not persons under section 1983, however, the trial court analyzed whether the defendants were therefore entitled to qualified immunity. Essentially, however, the trial court found that the individual defendants had committed no constitutional tort. The trial court issued its ruling prior to the publication of this Court's decision in *Will.*

analysis of Eleventh Amendment immunity in federal courts points out only that a state official acting under color of state law who commits a constitutional tort cannot be shielded by the Eleventh Amendment from liability; (1) if the case against the official as an individual actor is properly pleaded and (2) there is substantial evidence presented that such a tort was, in fact, committed. *Id.* at 895-898. The fact that the Court of Appeal in the instant case phrased its finding in terms of official capacity, because the issue was presented as such, instead of phrasing it in terms of lack of a triable issue of fact, as the *Kolb* court did, is a distinction without a difference.

In any case, it is plain that no qualified immunity analysis applies when there is a finding of no liability.

B. No Qualified Immunity Analysis is Warranted Because Plaintiffs Presented No Evidence to Raise A Triable Issue of Fact As to Defendants' Violation of Their Federal Constitutional Rights

The issue of qualified immunity arises *only* if an official in fact does violate a plaintiff's rights while acting under color of state law. If such an official can demonstrate that the violation was a good faith mistake, *i.e.*, that his actions did not contravene clearly established statutory or constitutional rights of which a reasonable official would have known, then that official is entitled to qualified immunity, which absolves him of liability. *Anderson v. Creighton,* 483 U.S. 635; 107 S.Ct. 3034, 3038 (1987); *Harlow v. Fitzgerald, supra,* at 818. Since there is no finding anywhere in the instant case that any of the individual defendants herein violated any of plaintiffs' constitutional rights under section 1981 or section 1983, qualified immunity is simply not an issue.

If plaintiffs had in fact presented evidence in the trial court or the Court of Appeal that their federal rights had been violated by the individual defendants purporting to act under color of state law, then it would have become necessary to determine whether these defendants were entitled to qualified immunity. However, in this case, no such evidence was ever properly presented to the trial court or made part of the record before the Court of Appeal. The statement of facts set forth in petitioners' brief is largely unsup-

ported by the record, and the alleged facts argued on pages 17 and 25 to 27 of their brief are *totally* unsupported by the record. Furthermore, the allegation contained in Petitioners' Brief at p. 24, fn. 14 is simply false.[9] This case has been extensively briefed and argued, and no court has found evidence of unlawful motivation on the part of any of the individual defendants.

Although the record is voluminous, a thorough investigation reveals that the conduct of the defendants in delaying the issuance of licenses to individual applicants who failed to establish minimum state eligibility requirements was reasonable and proper. There simply was no evidence that any of the defendants' conduct was motivated by impermissible racial or ethnic factors. Even Marc Grimm, who served as counsel for the plaintiffs and who is prominently mentioned in Petitioners' brief, admitted in a sworn statement which is part of the record, that there was no evidence of racial discrimination by any of the defendants in this case.

The record reflects that the defendants granted licensure, as physicians and surgeons, to hundreds of persons who were educated and trained by the University of Saigon Medical School without any consideration of racial or ethnic factors. The only licenses which were delayed were those for the four individual plaintiffs, and a few other similarly situated applicants. Those delays occurred because of the inability to determine education and training, not because the applicants were Vietnamese. When the plaintiffs were able to establish that they met the requirements for licensure, they were licensed. Thus, the initial delays were made by the individual defendants solely in their official

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[9] Defendants supported their motion for summary judgment with volumes of official documents concerning the processing of plaintiffs' applications, portions of depositions taken in the case (including one wherein a plaintiff admitted that there was no evidence of racial or ethnic prejudice in the delays of licensure), and affidavits from virtually every percipient witness setting forth the facts and documenting the conduct of each individual defendant with respect to the applications involved and the actions taken. In fact, the evidence revealed that some of the individual defendants named were not even members of the Division of Licensing at the time the alleged violations took place.

capacities and not otherwise and were necessary and proper to carry out the board members' duty to protect the public safety by ensuring that licensees have the proper education and training.

In summation, despite this Court's clear holding in *Will*, that "neither a State nor its officials acting in their official capacities are 'persons' under section 1983," *Id.* at 2312, and petitioners' own factual admissions (Resp. App. C), plaintiffs contend that *Will* only applies to those cases where state officials are "sued" in their official capacities and not where officials are allegedly sued in both their individual and official capacities. This limited and contorted interpretation of *Will* is based upon a purely semantic distinction between individuals "acting" in their official capacities and being "sued" in their official capacities. Such a limited interpretation would render the Court's holding in *Will* meaningless because a plaintiff who sued a state official could circumvent the holding in *Will* simply by engaging in creative pleading. In addition, of course, plaintiffs' contention would hold the entire summary judgment procedure meaningless if pleading could overcome evidence.

The facts of the instant case fall squarely within the holding of *Will*.[10] Plaintiffs cannot circumvent the clear holding in *Will* simply by *pleading* that defendants are being sued in their official and individual capacities; the undisputed facts of this case show that defendants were at all times acting as state officials in their official capacities, and not otherwise. Therefore, given the facts of this case, it was unnecessary for the Court of Appeal to even reach the question of qualified immunity; and, accordingly, this Court should not grant certiorari upon an issue which is not appropriately before it.

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[10] The Court's holding in *Will* that state officials are not subject to suit under section 1983 is consistent with Ninth Circuit case law and California case law on the subject. See *Jackson v. Hayakawa*, 682 F.2d 1344, 1350 (9th Cir. 1982); *National Association for the Advancement of Colored People v. State of California*, 511 F.Supp. 1244, 1250 (1981); *Pyne v. Meese*, 172 Cal.App.3d 392, 402-403; 218 Cal. Rptr. 87, 91-92 (Ct. App. CA, 1985).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari in this matter should be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

PAUL V. BISHOP
Deputy Attorney General
(Counsel of Record)

VIVIEN HARA HERSH
SUSAN K. MEADOWS
Deputy Attorneys General

Counsel for Respondents

September 1990